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In The
Supreme Court of the United States

LINDA LINGLE, GOVERNOR OF THE STATE OF HAWAII, and MARK J. BENNETT, ATTORNEY GENERAL OF THE STATE OF HAWAII,

Petitioners,

v.

CHEVRON USA, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Just Compensation Clause authorizes a court to invalidate and enjoin state economic legislation on the basis that the law effects a "taking" because it does not "substantially advance a legitimate state interest," without regard to whether the challenged legislation diminishes the economic value or usefulness of any property.

2. Whether, even if applicable in takings analysis, the "substantially advance a legitimate state interest" inquiry authorizes a court to conduct a *de novo* trial to determine if challenged legislation will achieve its goals, or whether the court should instead apply a deferential standard of review equivalent to that traditionally applied in reviewing economic legislation under the Due Process and Equal Protection Clauses.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were petitioners Linda Lingle, the Governor of Hawaii, and Mark J. Bennett, the Attorney General of Hawaii, and respondent Chevron USA, Inc. Pursuant to Fed. R. App. P. 43(c)(2), Linda Lingle was substituted below for her predecessor as Governor, Benjamin J. Cayetano, and Mark J. Bennett was substituted below for his predecessors as Attorney General, Earl I. Anzai and Margery S. Bronster. (The opinion of the Ninth Circuit issued on April 1, 2004 erroneously listed former Attorney General Bronster as a defendant; the court amended its opinion on April 15, 2004 to correct the caption.)

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1) is reported at 363 F.3d 846. The opinion of the District Court (Pet. App. 30) is reported at 198 F. Supp. 2d 1182. A prior decision of the Court of Appeals, reversing summary judgment and remanding for trial (Pet. App. 54), is reported at 224 F.3d 1030. The District Court's initial decision granting summary judgment (Pet. App. 94) is reported at 57 F. Supp. 2d 1003.

JURISDICTION

The Court of Appeals entered its judgment on April 1, 2004. On June 21, 2004, Justice O'Connor extended the time to file a petition for certiorari to July 30, 2004, and the petition was filed on that date. This Court granted the petition on October 12, 2004. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Fifth Amendment to the Constitution provides in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment provides, in Section 1: "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The relevant portions of Act 257, Haw. Rev. Stat. § 486H-10.4 (1997), are reprinted in the appendix to this brief.

STATEMENT OF THE CASE

1. This case involves a challenge to legislation enacted by the State of Hawaii to forestall the evils of

oligopolistic concentration in the retail market for gasoline in this State. Hawaii, which is "physically small and geographically remote," is subject to high levels of concentration in certain markets, leading to prices above competitive levels that harm Hawaii's consumers. Act 257, § 1(4), App. 1-2. The wholesale markets for oil and oil products in particular are highly concentrated, JA 139, adversely affecting an industry of "vital importance" to the welfare of Hawaii's people. Act 257, §§ 1(1), (5), App. 1-2. Hawaii is served by only two refiners; the larger of those refiners, Chevron USA, Inc., controlled 60% of the market share for gasoline produced or refined in Hawaii in 1997. JA 43. The wholesale market for gasoline on Oahu, the state's most populous island, is divided among only six companies, with respondent Chevron holding 30% of the wholesale market. JA 43-44.

Until now, the retail market for gasoline has been protected from similar high concentration by the presence of numerous independent gas station operators. These operators set pump prices independently and in competition with one another, as well as with other stations operated by the oil companies themselves and staffed with company employees. JA 95-96. In a typical lessee-dealer arrangement, such as those employed by Chevron in Hawaii, the oil company purchases or leases land, builds a service station, and leases the land and facilities to a dealer. The oil company charges the lessee-dealer a monthly lease rent, usually defined as a percentage of sales of gasoline and sometimes other goods, and also requires the dealer to enter into a supply contract with the oil company, under which the dealer commits to purchase motor fuels from the oil company for resale to the public at a wholesale price unilaterally set by the oil company. JA 37-38.

Act 257 was enacted to maintain the benefit for consumers of a multiplicity of independent lessee-dealerships that set retail prices on a competitive basis.

The Act accomplishes that objective by preventing oil companies from converting independent stations to company-operated stations.[1] Replacing a prior law that broadly prohibited oil companies from directly operating gas stations, *see* App. 5-6, the Act takes a multi-pronged approach to forestall concentration in the retail market for gasoline. Section 3(a) of the Act prohibits oil companies from converting existing lessee-dealer stations to company-operated stations. Section 3(b) of the Act further protects lessee-dealers from economic pressure from oil companies by prohibiting oil companies from locating new company-operated stations within close proximity to a dealer-operated service station. Finally, to address the possibility that oil companies might try to accomplish such conversion indirectly by raising rents to the point that existing dealers would be forced out of business, Section 3(c) of the Act, at issue in this litigation, limits the maximum rent that oil companies may charge dealers. Section 3(c) limits the rent that an oil company may charge a lessee-dealer to 15% of the gross profit from the dealer's sale of motor fuel and 15% of the dealer's other gross sales. App. 2-3.

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[1] Because oil companies perceive company-operated stations as more profitable, JA 115, 120, oil companies have an economic incentive to replace leased stations with company-operated stations. Congress has repeatedly found that oil companies have engaged in anticompetitive practices toward independent retailers by, for example, imposing "massive" rent increases in order to force surrender of the dealers' leases. *See, e.g.*, S. REP. NO. 102-450, at 3-4, 6 (1992) (Senate Comm. on Judiciary). Concerns over such practices led Congress to enact the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2806 ("PMPA"), which bars oil companies from directly converting leased stations to company-operated stations. *See* 15 U.S.C. § 2802. The PMPA does not explicitly control rent increases, however, and dealers have often failed in the difficult task of showing that allegedly predatory rent increases violated the PMPA. *See, e.g., Duff v. Marathon Petroleum Co.*, 51 F.3d 741 (7th Cir. 1995). *See generally*, Brief for the Service Station Dealers of America as Amicus Curiae.

Although Act 257 employs rent regulation to achieve its goals, it was not enacted primarily for the benefit of dealers paying rent (in contrast to, for example, an apartment rent control measure intended primarily for the benefit of rent-paying tenants). Rather, the Act seeks to stabilize the present structure of the retail market for gasoline, preserving the long-term benefit for consumers of multiple retail vendors and averting the economic harm that would occur if the retail market, like the wholesale market, were to become concentrated in the hands of the few oil companies serving the islands.[2]

2. Chevron USA, Inc., the largest refiner and marketer of gasoline in Hawaii, sued the Governor and Attorney General of Hawaii in district court under 42 U.S.C. § 1983, claiming that the rent cap imposed by Act 257 on its face effects an unconstitutional taking of Chevron's property and violates due process and equal protection. Chevron sought declaratory and injunctive relief, but did not request compensation. JA 5-20.

Chevron subsequently stipulated that the cap on permissible rent established by Act 257 limits its collection of rent at only 11 of the company's 64 lessee-dealer stations; at Chevron's other 53 stations, Act 257 permits Chevron to collect more rent than it would otherwise seek to charge. JA 37, 45-47. Chevron in fact recovers more rent in aggregate from its leased stations under Act 257 than it otherwise would have charged under its own rental program, and the Act allows Chevron to raise its aggregate rental income by as much as $1.1 million if it chooses. JA 47.

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[2] In the same time period as it enacted Act 257, the State initiated antitrust litigation, later settled, against the oil companies serving the state. *See Anzai v. Chevron Corp. et al.*, Civ. No. 98-00792-SPK (D. Haw.).

As is customary in this industry, the rent that Chevron charges its lessee-dealers (under Act 257 or otherwise) does not fully cover its projected expenses for its dealer stations; rather, Chevron also looks to earnings from gasoline sales to provide an income stream to make its dealer station operations profitable. JA 38-39. Thus, Chevron stipulated that it "has not within the last 20 years recovered its expenses relating to dealer stations . . . in Hawaii or elsewhere in the United States from dealer station rents." JA 40. Chevron also stipulated that, including its earnings from gasoline sales, "Chevron has earned in the past and anticipates that it will earn in the future, at the rent levels allowed by Act 257, a return that satisfies any Constitutional standards on its investment in lessee dealer stations in Hawaii." *Id.*

In 1998, the District Court granted Chevron summary judgment on its claim that § 3(c) of Act 257 effects a taking of its property, and enjoined enforcement of the statutory rent cap. In reaching that conclusion, the District Court did not conclude that Act 257 had physically appropriated any property of Chevron, that Chevron had been denied any of the essential aspects of the "bundle of sticks" making up its property rights, or that Chevron had been denied the economically beneficial use of its property. Rather, relying on language from this Court's decision in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), the court held that the rent cap in Act 257 constitutes a taking because it "does not substantially advance legitimate state interests." Pet. App. 118. The court also rejected the State's argument that, in adjudicating the taking claim, it should employ a deferential standard of review similar to that applied in the review of economic legislation under the Due Process Clause. Pet. App. 103-06. Chevron then voluntarily dismissed its due process and equal protection claims without prejudice.

3. On appeal, the Ninth Circuit held that the District Court applied a correct standard of review under the Just

Compensation Clause, but vacated the grant of summary judgment and remanded for trial. The court read a previous circuit decision, *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), to foreclose the State's argument that a deferential, rational-basis standard of review should apply. Rather, the court stated that "a challenged regulatory action 'substantially advances' its interest if it bears a reasonable relationship to that interest," and concluded that "[w]hether Act 257's rent cap is reasonably related to its objective of lowering fuel prices certainly depends on whether it will in fact lead to lower fuel prices." Pet. App. 76.

Finding that the expert affidavits before the trial court did not resolve that question, the Court of Appeals directed the District Court on remand to use trial procedures, including assessment of the credibility of the parties' expert witnesses through cross-examination, to determine as a matter of "predictive fact" whether the statute will achieve its goals. Pet. App. 69-72. The majority directed the District Court to focus in particular on two questions that it viewed as going to the effectiveness of Act 257: whether dealers could recover a "premium," representing the economic value of the rent cap, if they sublease their stations, and whether Chevron could recoup any lost rent under the new law simply by raising its wholesale prices for gasoline sold to its dealers. Pet. App. 69. The majority rejected, however, Chevron's alternative argument that Act 257 was a taking because it deprived the company of economically viable use of its property. The majority noted that the Act permits Chevron to recover approximately $1.1 million more in rent than it would otherwise have charged. Pet. App. 77.

Judge William Fletcher concurred in the Ninth Circuit's reversal of summary judgment for Chevron, but disagreed with the majority regarding the applicable legal standard. Judge Fletcher contended that this Court's precedents require that rent controls and other price

controls be evaluated under a deferential standard of review, rather than the heightened "substantially advance" standard employed by the majority. Pet. App. 79-93.

4. On remand, the District Court held a one-day evidentiary hearing at which the parties each presented a single expert economist to give his opinion on the effectiveness of Act 257's rent cap in protecting Hawaii's consumers. Chevron's expert, Professor John Umbeck, argued that dealers will be able to capture a premium reflecting the economic benefit of the rent cap if they sublease their stations to new dealers, making the law ineffectual to the extent it aims at lowering dealer costs. He also opined that oil companies will try to recoup at least part of any lost rent by increasing the wholesale gasoline prices charged to their dealers, undermining the goal of controlling gasoline prices. Finally, Professor Umbeck argued that the rent cap will discourage oil companies from investing in new lessee-dealer stations, leading over time to fewer such stations. JA 48-65. Professor Umbeck did not deny, however, that the law will prevent oil companies from using rent increases to displace lessee-dealers.

The State's expert, Professor Keith Leffler, testified that, by helping to maintain the existence of lessee-dealers as independent price-setters, Act 257 protects Hawaii's consumers from the economic harm that would result if the retail gasoline market were controlled directly by a few oil companies. He also testified that the legislation will achieve this goal whether or not existing dealers could capture a premium upon subleasing, because the rent cap will in any case preclude the oil companies from raising rents to the point of driving dealers out of business. Professor Leffler rejected Chevron's contention that the oil companies will attempt to raise wholesale prices; given that Chevron's wholesale prices are presumably already set to maximize net revenue, fundamental economic principles teach that any increase in prices would lead to a

reduction in net revenues from reduced sales volume. He also disputed Chevron's suggestion that the rent cap will deter the oil companies from investing in new lessee-dealer stations, and opined that the legislation will benefit consumers as long as some lessee-dealers remained in the retail market. JA 91-103.

After searching in vain for demeanor evidence that might help establish the witnesses' credibility, Pet. App. 43, the District Court concluded that the economic theories presented by Chevron's expert were "more persuasive" than those of the State's expert. *Id.* The District Court therefore concluded that Act 257 does not "substantially advance a legitimate state interest," and thus effects a taking of Chevron's property. Pet. App. 53. The District Court acknowledged that the rent cap would prevent oil companies from raising rents to levels designed to drive lessee-dealers out of business, but it discounted this justification for the Act because it did not believe that oil companies would attempt such constructive eviction. Pet. App. 48, 52.[3]

5. On appeal once more to the Ninth Circuit, the State argued that Chevron's claim that Act 257 does not "substantially advance a legitimate state interest" lies under the Due Process Clause, rather than the Just Compensation Clause. The State also argued that, whatever the constitutional basis for Chevron's challenge, the District Court should have deferred to the rational economic

[3] The District Court overlooked testimony in the trial record that oil companies preferred direct operation of gasoline stations, JA 115, as well as the testimony of Chevron's own expert that he had served as an expert witness for oil companies in many cases where dealers alleged that oil companies had raised their rents in order to drive them out of business. JA 112-15. As noted, *supra* n.1, Congress has explicitly recognized that oil companies engage in anticompetitive practices toward independent dealers, including attempting to evict them through "massive" rent increases.

judgment of the legislature that the rent cap will benefit consumers. The Court of Appeals held that these arguments were barred by the law of the case established in its previous decision. Pet. App. 5. The Ninth Circuit noted that the "varying opinions" of the Supreme Court "suggest confusion over the relationship between due process and takings claims," Pet. App. 10, but concluded that this Court had not clearly repudiated the "substantially advance" takings formulation, and held that its prior decision applying this formulation was not clearly erroneous. Pet. App. 11-13. The Court of Appeals also concluded that it had not erred in requiring a heightened, "intermediate" standard of review under this takings theory. Pet. App. 14-17.

Applying heightened scrutiny, the Court of Appeals affirmed the District Court's conclusion that the rent cap imposed under Act 257 does not substantially advance a legitimate state interest. In reaching that conclusion, the Court affirmed, under the clearly-erroneous standard, findings of the District Court purporting to conclude that the law would fail to have the effect of reducing gasoline prices.[4] Pet. App. 21. The Court did not address whether

[4] The Court of Appeals rejected the State's contention, however, that the District Court's finding that Act 257 will prevent constructive eviction of lessee-dealers established that the law substantially advances the State's goals, even under a heightened standard of review. In reaching that conclusion, the Court of Appeals misapprehended the purpose of Act 257. The Court of Appeals suggested that the purpose of the law was to *reduce current* retail prices for gasoline, not – as the State had maintained – to *preserve* the current, relatively unconcentrated structure of the retail gasoline market. Pet. App. 18. The State did not contend, however, that Act 257 would have the effect of directly reducing current gasoline prices; rather, it argued that, by maintaining the viability of lessee-dealers, the Act will prevent future harm, in the form of increased gasoline prices, that would result if independent retail gasoline vendors were eliminated. Protection of the lessee-dealers is thus a means to avoid the economic harm of oligopolistic concentration in the retail market for gasoline. Testimony by the State's expert,

(Continued on following page)

the rent cap would survive the traditionally deferential rational-basis review of economic legislation.

Judge Fletcher dissented, repeating his view that the "substantially advance" takings test was incorrectly applied to the rent cap imposed by Act 257:

> We took a wrong turn in *Richardson*, we continued on the wrong path in *Chevron I*, and we are now in the wrong place. Under the panel's holding, virtually all rent control laws in the Ninth Circuit are now subject to the "substantially advances a legitimate state interest" test, and many of those laws may well be held unconstitutional under that test. Rent control is often inefficient and sometimes unfair. But we should not confuse inefficiency and unfairness with unconstitutionality.

Pet. App. 29 (internal quotes and citations omitted).

SUMMARY OF ARGUMENT

I. Relying on language in this Court's decision in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), the Court of Appeals concluded that general economic regulatory legislation can be held to effect a "taking" of property if it does not "substantially advance legitimate state

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quoted by the Ninth Circuit, makes the prophylactic nature of the act clear: "The lease rent cap imposed by Act 257 is likely to lessen the adverse competitive effects that result from the highly concentrated gasoline markets in Hawaii by maintaining the viability of independent dealers and thereby benefit consumers by reducing gasoline prices *below what they would be otherwise*." JA 94, quoted at Pet. App. 19 (emphasis added). *See also* JA 97 (predicting an increase in gasoline prices if lessee dealers were no longer an active anticompetitive force in Hawaii gasoline market); JA 100 (impact of Act is not to benefit dealers immediately but to prevent *future* actions injuring the dealers); JA 133-35 (describing effect of law as leading to more lessee-dealers in the market than would be the case if the oil companies tried to replace them).

interests." This ruling is mistaken because the "substantially advance" inquiry represents a due process test, not a test for a taking under the Just Compensation Clause.

A. The ruling below that a law may effect a taking because it fails to advance a legitimate purpose is inconsistent with basic principles of takings jurisprudence. Because regulatory takings doctrine rests on the analogy between government actions that severely restrict the use of private property and government actions that directly appropriate private property, an essential focus of this Court's regulatory takings analysis has always been the economic impact of regulation. The "substantially advance" test addresses only the *effectiveness* of government action, however, and disregards economic impact altogether. This test, which asks whether the government's action is invalid and must be rescinded, contradicts the settled understanding that the primary purpose of the Just Compensation Clause is not to restrict government from appropriating property, but rather to require compensation for such appropriations. In suggesting that a government action may be a taking *because* it is illegitimate, the "substantially advance" theory also conflicts with the basic understanding that the valid exercise of the government's taking power *depends* on its serving a legitimate "public use." Finally, the incongruity of this test is shown by the fact that it would appear logically to support injunctive relief, while this Court has emphasized that compensation, rather than an injunction, is generally the proper remedy for a taking.

B. This Court's statement in *Agins* that a government regulation of property may effect a taking if it does not "substantially advance legitimate state interests" actually reflects the traditional test for a substantive violation of the Due Process Clause, rather than a test for a violation of the Just Compensation Clause. The touchstone of substantive due process is protection against arbitrary government action, the same inquiry at issue in

the "substantially advance" test. The *Agins* Court in fact relied solely upon due process precedents for the "substantially advance" formulation, and its statement was dictum, since the legitimacy of the government's purposes was not disputed in that case. In historic context, the Court's intermingling of due process and takings principles is understandable, but the Court's due process precedents rest on a doctrinal basis that is distinct from, and inapposite to, takings law.

C. There is no sound reason why this Court should not now clarify that the "substantially advance" formulation represents a due process inquiry, rather than a test for a taking under the just Compensation Clause. This Court has never squarely relied upon this supposed standard, apart from two cases addressing exactions. The exaction cases rest on their own doctrinal foundation, and the demanding standards established in those cases will not be affected by declaring that the "substantially advance" test is a due process, rather than a takings, inquiry.

II. Even if means-ends analysis were appropriate under the Just Compensation Clause, the judgment of the Ninth Circuit should be reversed because that court used an inappropriately exacting standard of review. The District Court conducted a trial to determine, as a question of "predictive fact," and without the normal deference shown to legislative policymaking, whether Act 257 would actually achieve its purposes, and the Ninth Circuit expressly upheld this *de novo* review of the wisdom of the legislature's judgment. This dramatic departure from the deferential review normally accorded economic legislation has no foundation in logic or the precedents of this Court.

A. The lower courts' *de novo* review of the substantive wisdom of Act 257 represents an extraordinary deviation from the deferential standard of review appropriate in constitutional challenges to economic legislation. Since the demise of the *Lochner* era, this Court has emphasized that it will not second-guess the efficacy of state laws regulating

economic matters. The Court's commitment to judicial restraint in its review of economic legislation is based on important principles of democratic self-governance, institutional competence, and federalism. Nothing in the Just Compensation Clause justifies a departure from these settled principles of deferential review.

B. Assuming that the "substantially advance" test were a valid taking test, this Court's decisions support application of deferential review to claims under this test. The *Agins* Court itself gave broad deference to the public purposes served by the zoning law before it, and its contemporaneous statements indicate that the Court viewed the "substantially advance" test as a continuation of normal principles of deferential review. The Court has subsequently agreed unanimously that courts should not inquire into the efficacy of laws under the Just Compensation Clause. Nothing in this Court's subsequent decisions justifies the Ninth Circuit's disregard of this teaching.

ARGUMENT

INTRODUCTION

The Court of Appeals ruled in this case that the rent cap imposed by Act 257 effected an unconstitutional "taking" of Chevron's property under the Just Compensation Clause, even though (a) Chevron has never suggested that Act 257 directly appropriated any of its property interests, (b) the Court of Appeals itself concluded that Chevron had not been denied the economically beneficial use of its property, and (c) Chevron acknowledged that the income it will receive from its property under Act 257 satisfies any constitutional standard. The Court of Appeals understood language in this Court's decision in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), to support a finding of a taking if a court concludes that state legislation would not successfully accomplish its intended goal. Moreover, in applying this anomalous test, the Ninth

Circuit believed it was appropriate for the trial court to conduct a trial to determine, as a matter of "predictive fact," and without any deference to the legislature's policy judgment, whether the challenged law would actually accomplish its purpose. As the State explains below, this extraordinary decision is irreconcilable with the precedents of this Court and the basic principles governing takings jurisprudence.

I. THE ALLEGED FAILURE OF ECONOMIC LEGISLATION TO "SUBSTANTIALLY ADVANCE A LEGITIMATE STATE INTEREST" DOES NOT SUPPORT A CLAIM OF A TAKING UNDER THE JUST COMPENSATION CLAUSE

A. The "Substantially Advance" Test Is At Odds With Basic Principles of Takings Jurisprudence

1. The Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. Amend. V. As this Court has observed, the plain language of the Amendment – which refers to the government's "tak[ing]" of private property – does not appear to address regulations of the use of property, but rather applies most naturally to government appropriations and invasions of private property. Indeed, "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992). Thus, until this Court's decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Lucas*, 505 U.S. at 1014 (citation omitted).

The Court has long abandoned a purely literal reading of the language of the Amendment, of course, and has

concluded that a government regulation of property may constitute a taking of property that requires payment of "just compensation" to the owner. Nonetheless, the language and original understanding remain powerful touchstones in applying the Just Compensation Clause, for the Court has confined its doctrine of regulatory takings to severe use restrictions that are analogous to direct appropriations. Thus, as the Court explained in *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 199 (1985), in determining whether regulatory measures go "too far," a court's task is "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." *See also Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 n.17 (2002) (regulatory taking occurs when "a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation").

To implement this basic understanding of regulatory takings doctrine, the Court has developed a comprehensive framework for analysis – no aspect of which is at issue or questioned in this case – that focuses largely, if not exclusively, on a regulation's economic impact on the particular claimant.[5] In *Lucas*, the Court recognized that a regulation that denies an owner all economically viable use of property will almost invariably be deemed a taking. 505 U.S. at 1015. Outside the *Lucas* category, the Court applies a more nuanced analysis based on its decision in

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[5] For cases involving regulations that result in actual physical occupations, the Court has employed a distinct analysis that is irrelevant to a case such as this one, which clearly does not involve physical occupation of property. *See Tahoe-Sierra*, 535 U.S. at 392 (observing that "it [is] inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa").

Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978), which has been recognized as "the polestar" of the Court's regulatory takings doctrine. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring); *see also Hodel v. Irving*, 481 U.S. 704, 713 (1987) (referring to *Penn Central* framework as "firmly established"). The *Penn Central* framework also makes the economic impact of a regulation central to the analysis, including an examination of "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." 438 U.S. at 124.[6]

Thus, while the Just Compensation Clause is intended in a general sense to deter oppressive and unfair governmental action, it accomplishes this purpose through the specific means of requiring the government to pay for appropriations of property and use restrictions of analogous severity. As the Court observed in *Armstrong v. United States*, 364 U.S. 40, 49 (1960), "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *See also San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting). Conversely, a government regulation that does not impose severe burdens on a

[6] The Ninth Circuit, in its initial opinion in this case, summarily rejected the theory that Chevron had suffered a taking under *Lucas*. Pet. App. 77. Chevron has never asserted a claim under *Penn Central*, and it is unlikely that it could raise such a claim at this late date, after a full trial at which it had the opportunity to present all its takings theories. In any event, such a claim should fail, given the heavily regulated nature of the wholesaler-dealer relationship and the lack of any showing of constitutionally significant economic injury as a result of the enactment of Act 257.

property owner or severely diminish the value of property does not implicate the concerns animating the Just Compensation Clause. *See Penn Central*, 438 U.S. at 135-38; *Kirby Forest Indus. v. United States*, 467 U.S. 1, 15-16 (1984); *Andrus v. Allard*, 444 U.S. 51, 65-67 (1979).

Given the focus in *Penn Central* and the Court's other regulatory takings cases on the severity of a regulation's economic impact on a property owner, it is evident that the means/ends scrutiny applied by the Court of Appeals is out of place in regulatory takings doctrine. The "substantially advance" test, as applied by the Court of Appeals, addresses the *effectiveness* of government action, not its economic impact, and in fact utterly disregards adverse economic impact. Thus, under the "substantially advance" formulation, a law can be declared an unconstitutional taking if a court concludes that it will not accomplish its intended aim, even if its economic impact is minimal.

This case represents a stark illustration of the anomalous nature of this ostensible takings test. The Ninth Circuit held Act 257 to be a taking even though Chevron stipulated that it will receive under the provisions of Act 257 "a return that satisfies any Constitutional standards on its investment" in its service stations in Hawaii, and admitted that it can receive more rent in aggregate under the law than it would otherwise charge. JA 40, 47. While Chevron's objection to the Act arguably raised a colorable issue under the Due Process Clause, it did not raise a concern that Chevron's property was being taken without just compensation.

2. The "substantially advance" test is also inconsistent with the Court's settled understanding, based on the language of the Just Compensation Clause, that the principal purpose of the Clause is not to interpose substantive barriers to government appropriation of private property, but rather to ensure that "just compensation" is paid when the government takes such action. As the Court

explained in its landmark decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987):

> [The Just Compensation Clause] does not prohibit the taking of private property, but instead places a condition on the exercise of that power. . . . This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.

Thus, when a government action effects a taking, the Just Compensation Clause requires compensation – nothing more – and a violation of the Clause is established when the government fails to pay compensation for a taking of private property. *See Brown v. Legal Foundation of Washington*, 538 U.S. 216, 235 (2003), *quoting Williamson County*, 473 U.S. at 194 ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.").[7] *See also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 714 (1999), ("If the condemnation proceedings do not, in fact, deny the landowner just compensation, the government's actions are neither unconstitutional nor unlawful."). If a court concludes that the government has engaged in a "taking" of private property – either through outright appropriation or severe regulation – then the government

[7] This point explains why taking claims must ordinarily first be pursued through any compensation procedures that the State has established; unless and until the State definitively refuses compensation, no unconstitutional taking of property *without* just compensation has occurred. *See Williamson County*, 473 U.S. at 194-95. The Ninth Circuit, however, has allowed claimants pursuing a "substantially advance" taking claim to skip state compensation remedies and proceed directly to federal court. *See* p. 22 n.10, *infra*.

must pay just compensation; the government is, in effect, required to act as if it had purchased the property at fair market value (rather than, for example, being required to pay consequential damages). *See United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979). But it is equally true that, if the government *does* properly compensate the property owner, the constitutional imperative of just compensation is satisfied. "Taking" analysis then has no further role to play, for as the Clause makes clear, what a "taking" of private property requires in return is just compensation. The "substantially advance" test, however, ignores the compensatory purpose of the Just Compensation Clause, focusing instead on whether the government action can proceed at all.

3. Furthermore, the substantially advance test is inconsistent with the basic understanding, also rooted in the language of the Fifth Amendment, that exercise of the taking power is conditioned on the government's serving a legitimate "public use." As the Court recognized in *First English*, the Just Compensation Clause requires compensation for burdensome – but "otherwise proper" – government impairments of property interests. 482 U.S. at 314. If the "otherwise proper" governmental action amounts to a "taking," then compensation must ensue; but if the governmental action is *not* "otherwise proper" then the government may not take the property at all, and whether or not the governmental action would be severe enough to amount to a "taking" is wholly irrelevant. Given that the Just Compensation Clause presupposes that the government is pursuing a legitimate public purpose, the Clause cannot, as a logical or legal matter, support a claim of a taking based on allegedly *illegitimate* governmental action.

The understanding that a valid government action is a prerequisite for invoking the taking power has been a part of takings doctrine from its inception to the present day. As the Court explained in *Hawaii Housing Authority v.*

Midkiff, 467 U.S. 229, 245 (1984), governmental action that could not "withstand the scrutiny of the public use requirement ... would serve no legitimate purpose of government and would thus be void." *See also Mahon*, 260 U.S. at 415 ("The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation."); *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 231 (2003) (stating that a "condition" for any exercise of the government's taking power is that the government action serve a "public use," and equating this requirement with a requirement that the government action be "legitimate").

If a government proposal to take private property does not serve a public use, then the action cannot be a valid taking for which compensation would be required under the Just Compensation Clause. The government may not use its power of eminent domain to take property for an improper purpose, regardless of whether compensation is offered or available through the courts. *See Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 80 (1937) ("[O]ne person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid."). That is true, moreover, whether the issue arises in a condemnation case or an inverse condemnation case. *See San Diego Gas & Elec.*, 450 U.S. at 656 n.23 (Brennan, J., dissenting) (noting that a "government entity may not be forced to pay just compensation" for a regulation that was invalid because it lacked a "public use"); *Brown*, 538 U.S. at 231. If a government regulation is arbitrary or irrational, it cannot become permissible as a result of a government offer to pay compensation, and it would make no sense to impose an obligation on the public to pay just compensation for a regulation that is invalid and must therefore be rescinded.

This presupposition of a legitimate "public use" demonstrates that the validity of the government action *is* a relevant consideration in takings cases. The issue arises, however, not in assessing whether the government action amounts to a "taking," but in the entirely distinct inquiry into whether the government's action serves a "public use."[8] Thus, for example, when the fact of a taking is undisputed, as when the government directly deploys its eminent domain power, it may be necessary to inquire whether the action serves a legitimate public purpose. *See National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1992); *Berman v. Parker*, 348 U.S. 26, 32 (1954). But where the question at issue is whether there has been a "taking," the answer cannot turn on whether or not the government action serves a valid public purpose. Indeed, if there is no predicate taking, caused by a direct appropriation or a severely burdensome regulation, there is no need for a court to even address the public use issue, because the public use requirement becomes pertinent only if a taking has in fact been demonstrated.

4. Finally, the "substantially advance" theory of takings conflicts with the Court's longstanding rule that compensation, not an injunction, is ordinarily the appropriate remedy for a taking under the Just Compensation Clause. In accord with the "basic understanding" that the purpose of the Just Compensation Clause is to provide

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[8] *See Palazzolo*, 533 U.S. at 635 n.* (O'Connor, J., concurring) (distinguishing the question "whether the enactment or application of a regulation constitutes a valid exercise of the police power" from the "second question ... whether the state must compensate a property owner for a diminution in value effected by the State's exercise of its police power"); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 511 (1987) (Rehnquist, C.J., dissenting) (that a regulation serves a public purpose "does not resolve the question whether a taking has occurred; the existence of such a public purpose is merely a necessary prerequisite to the government's exercise of its taking power").

compensation, "not to limit the governmental interference with property rights per se," *see First English*, *supra*, the Court has repeatedly stated that a plaintiff may not obtain an injunction under the Just Compensation Clause to block an alleged taking. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) ("Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking."); *accord Preseault v. ICC*, 494 U.S. 1, 11 (1990).[9]

Nonetheless, the Ninth Circuit has ruled that claimants are entitled routinely to seek injunctive relief in a taking suit based on the "substantially advance" theory. *See, e.g., Daniel v. County of Santa Barbara*, 288 F.3d 375, 384-85 (9th Cir. 2002).[10] On one level, this conclusion is

[9] The Court has recognized a narrow exception to this general rule where, as a practical matter, it would impossible for the government to remedy the alleged taking through payment of compensation. *See Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 71 n.15 (1978) (equitable relief available under the Just Compensation Clause to prevent "potentially uncompensable damages" that might be sustained after a nuclear event). *See also Babbitt v. Youpee*, 519 U.S. 234 (1997) (enjoining statute severely impairing right to devise property). In addition, in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), a plurality of the Court suggested that, to the extent a taking claim may be based on a government mandate that one private party pay out funds to another private party, a suit may be brought under the Just Compensation Clause to prevent an enforcement of such an obligation. Neither exception applies in this case.

[10] Consistent with the view that injunctive relief is an appropriate remedy under this takings theory, the Ninth Circuit has also ruled that a claimant raising a "substantially advance" taking claim may file suit immediately in federal court and has no obligation to exhaust available state compensation procedures, as ordinarily required under *Williamson County*, 473 U.S. at 185-97. *See, e.g., Daniel*, 288 F.3d at 385. The ability of takings claimants invoking this theory to avoid state exhaustion requirements, combined with the heightened level of scrutiny under Ninth Circuit precedents, means that litigants challenging state

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perfectly logical, for if a regulation is substantively void, then it should be enjoined; payment of compensation cannot authorize an invalid government action to continue, and the public should not be required to pay just compensation for an invalid action. But that very point demonstrates that inquiry into the substantive validity of a regulation is alien to regulatory takings doctrine. An injunction would be an appropriate remedy if the purpose of the Just Compensation Clause were to block government from engaging in illegitimate conduct. But an injunction is not an appropriate remedy precisely because, as explained above, the purpose of the Just Compensation Clause is not to block illegitimate action, but rather to provide compensation for burdensome, but "otherwise proper," government action.

B. The "Substantially Advance" Test Is Actually The Test For A Substantive Due Process Violation.

There is no question that, in *Agins* and some later cases, the Court has *stated* that a government regulation of property may amount to a taking if it does not "substantially advance legitimate state interests." As we now explain, however, this locution resulted from a mistaken transposition of substantive due process doctrine into takings law, where it does not belong. With the exception of two cases arising in the distinct context of exactions imposed as conditions for development permits, which readily stand on a separate doctrinal footing, the Court has never actually *held* a government regulation to be a "taking" under this language. Accordingly, the Court

and local regulations will routinely file in federal rather than state court. Thus, the issue raised by this case has significant implications for forum shopping between the federal and state courts, as well as for the potential burdens such claims may impose on federal courts.

should recognize the "substantially advance" language for what it is: the traditional test for a substantive violation of the Due Process Clause.

1. The "substantially advance" language merely restates the traditional inquiry into the substantive validity of regulation under the Due Process Clause. The Court has "emphasized time and again that '[t]he touchstone of due process is protection of the individual against arbitrary action of government,'" including "the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)); *see also State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (grossly excessive punitive damages award "furthers no legitimate purpose and constitutes an arbitrary deprivation of property" in violation of due process). The "substantially advance" takings test asks exactly the same questions as the due process test: are the government's ends legitimate, and has it selected appropriate means to accomplish those ends? This takings test is simply due process analysis under a different label.

This point is confirmed by the fact that the Court's takings decisions first articulating the test relied exclusively on due process precedents. The Court in *Agins* cited *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928), which held that a restriction on the use of property "cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare." The decision in *Agins* also cited *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), which upheld a municipal ordinance under a similar standard. 447 U.S. at 260-61. But neither *Nectow* nor *Euclid* involved claims under the Just Compensation Clause. Rather, the plaintiffs in each case contended that the regulations deprived them of property "without due process of law." *Nectow*, 277 U.S. at 185; *Euclid*, 272 U.S. at 384. In both cases, the constitutionality of the challenged

regulation was perceived by the Court as turning on whether it constituted a legitimate exercise of its police power, or was instead fundamentally arbitrary – a quintessential question of substantive due process. *See Nectow*, 277 U.S. at 187-88; *Euclid*, 272 U.S. at 387.

The Court's recitation in *Agins* of the "substantially advance" language as a test for a taking was dictum. Not only did the Court uphold the ordinance, but neither party raised any factual question about whether the ordinance was reasonably related to legitimate public purposes. Nor did either party suggest that a regulation's failure to advance a legitimate public purpose could render it a taking. To the contrary, both sides quite clearly presumed that governmental action may not be deemed a "taking" *unless* the regulation represents a valid exercise of governmental power.[11] The opinion in *Agins* also offered no explanation for why principles of substantive due process should be incorporated into takings doctrine.[12]

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[11] The claimant property owners in *Agins* challenged the California court's description of a regulatory taking as a "wrongful" act, *see Agins* (No. 79-602) Appellants' Brief at 16-17, and insisted that a regulatory taking claim focuses instead on "whether the proper exercise of this proper power nonetheless worked a taking by reason of its impact on the regulated property." *Id.* at 18-19. Moreover, the plaintiffs explicitly accepted the validity of the city's zoning ordinance. *See id.* at 17 n.5. Likewise, the defendant city distinguished the issue of whether the ordinance served a legitimate government interest, which it considered a question of *substantive due process*, *Agins* (No. 79-602) Appellees' Brief at 16-18, from the separate question of whether the adverse economic impact of the ordinance resulted in a *taking*. *Id.* at 18-22.

[12] For a sampling of scholarly commentary making the same observation that the "substantially advance" language in *Agins* was unsupported by precedent except substantive due process cases, *see* Kenneth Bley, *Substantive Due Process and Land Use: the Alternative to a Takings Claim*, in *Takings: Land-Development Conditions And Regulatory Takings After* Dolan *And* Lucas 289, 291 (1996); Frank Michelman, *The Jurisprudence of Takings*, 88 COLUM. L. REV. 1600, 1605-14 (1987); Jerold Kayden, *Land-Use Regulations, Rationality, and*

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The Court's reference in *Agins* to its due process cases was foreshadowed by language in the Court's opinion in *Penn Central*. In that case, the Court, citing due process precedents, noted that it had upheld land-use regulations restricting property interests where such regulations promoted the public health or welfare. *See* 438 U.S. at 124-25. The Court described *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), as an example of a case in which this analysis had been applied, and then observed: "It is, of course, implicit in *Goldblatt* that a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose. . . . " 438 U.S. at 127 (citing *Nectow*). This statement by the Court in *Penn Central* was clearly dictum, for there was no dispute in that case regarding whether New York City's efforts to preserve historic Grand Central Terminal advanced a legitimate public purpose. *See id.* at 129.

In any event, *Goldblatt* was, like *Nectow* and *Euclid*, a due process case. The plaintiffs' claim in *Goldblatt* was that a municipal ordinance violated the Due Process Clause, 369 U.S. at 591, and the Court viewed the issue, as in its previous due process cases, as whether the regulation "is a valid exercise of the town's police power." *Id.* at 594. The Court in *Goldblatt* separately addressed the possibility that the ordinance might constitute "a taking which constitutionally requires compensation," but then ruled that the potential taking claim could not prevail because there was no evidence demonstrating that the regulation had reduced the value of the property. *Id.* In

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Judicial Review: The RSVP in the Nollan *Invitation*, 23 URB. LAW. 301 (1991); Kenneth Salzberg, *"Takings" as Due Process, or Due Process as "Takings"?*, 36 VAL. U. L. REV. 413 (2002); Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining The Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713 (2002); D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471 (2004).

short, while *Goldblatt* did address both due process and takings theories, nothing in that opinion suggests that an alleged due process violation also can support a claim of a taking under the Just Compensation Clause, and the Court's taking analysis in *Goldblatt* focused on precisely the right factor – the economic impact of the regulation, not its workability or the fit between its means and ends.

2. Viewing *Agins* in historical context, it is not difficult to understand the Court's intermingling of due process and takings doctrine. *Agins* was one of the Court's first major cases in almost fifty years dealing with constitutional challenges to municipal land use regulation, and so the Court naturally referred back to its earlier decisions, *Nectow* and *Euclid*, that had addressed the constitutionality of zoning and urban planning. However, as explained above, those earlier cases rested on a doctrinal basis that was distinct from the concept of a taking in violation of the Just Compensation Clause.

The Court's intermingling of takings and due process doctrines in *Agins* may further be explained by the fact that the exact nature of the relation between the two doctrines was far more uncertain at the time that case was decided than it is today. For example, there was significant uncertainty at that time about whether a regulation that went "too far" in its effect on property constituted a "taking" for which just compensation might be due, or whether instead such a regulation constituted an invalid police power regulation in violation of the Due Process Clause. *See, e.g., Fred F. French Investing Co. v. City of New York*, 350 N.E.2d 381, 384-86 (N.Y. 1976) (adopting the latter view). The Justices of this Court debated this issue for several years. *See, e.g., Williamson County*, 473 U.S. at 197-200. The issue was not definitively resolved until the Court's decision in *First English*, which squarely held that the Just Compensation Clause requires a compensation remedy for regulations that are so onerous that they amount to takings. 482 U.S. at 314-17. The now-superseded theory

that a regulation that amounts to a taking can *only* be challenged under the Due Process Clause does not logically support the inverse proposition – that a substantively illegitimate government action that violates due process constitutes a taking in violation of the Just Compensation Clause. But the uncertainty generated by this theory about the proper relationship between takings and due process helps explain the Court's invocation of due process concerns as if they were also central to takings cases.

Finally, the confusion about the relationship between takings and due process doctrines in *Agins* may have reflected the Court's use in some earlier cases of terminology that blurred the distinction between the two doctrines. Thus, the Court variously described government actions challenged under the Constitution as an alleged "taking without due process of law," *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 740 (1970), or an alleged "taking . . . of property without due process of law, and a taking of . . . property without just compensation." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 244 (1964). This confusing terminology may well have reflected the underlying confusion during this period about the relationship between these two doctrines. In any event, it too helps explain the problematic language in *Agins* that has given rise to the "substantially advance" takings test.

Whatever the explanation, it is clear that the "substantially advance" formulation is a due process inquiry, not a takings test. The State is aware of no principled explanation for why due process analysis could or should be incorporated into takings doctrine for the purpose of deciding whether a taking has occurred.

C. Nothing Bars This Court From Clarifying That The "Substantially Advance" Test Represents A Due Process Inquiry, Rather Than A Takings Test

The State anticipates that Chevron will make at least three arguments against the clarification of takings doctrine outlined above. Chevron will likely argue that (1) the substantially advance test is "deeply embedded" in the Court's takings jurisprudence, and therefore it is too late in the day to bring order to regulatory takings doctrine, *see* Br. in Opp. 17; (2) judicial recognition that the "substantially advance" test is not a valid takings test would require the Court to overrule *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and (3) the "substantially advance" test should be preserved because it provides a necessary protection for private property interests. There is no merit to these arguments.

1. A review of the Court's takings precedents shows that the "substantially advance" test, far from being "deeply embedded" in takings doctrine, actually hangs by a gossamer thread, if indeed it is actually part of current takings doctrine at all. As discussed, the recitation of this test in *Agins* itself was dictum. Moreover, repudiation of this ostensible test would not cast doubt on the result of even one of this Court's takings decisions. In the 25 years since *Agins*, the Court has never (outside the special context of exactions, discussed below) squarely sustained a claim of a regulatory taking under the "substantially advance" theory. The majority of the Court's regulatory takings decisions during this period rely on the well-established *Penn Central* framework. They either ignore *Agins* altogether, *see, e.g., Ruckelshaus*, 467 U.S. at 1004-05, or rely on *Agins* solely for the second (and unquestioned) proposition articulated in that case – namely, that a regulation will be deemed a taking if it denies the owner

all economically viable use of the property. *E.g., Palazzolo*, 533 U.S. at 617.

Not only has the Court never (apart from the unique setting of exactions) relied on the "substantially advance" language in *Agins* to find a taking, but it has several times expressly questioned the validity of that theory. In the Court's most significant recent case to address whether the alleged illegitimacy of government action can support a taking claim, *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the majority of the Justices concluded that such an allegation falls outside the scope of the Just Compensation Clause. *Eastern Enterprises* involved a constitutional challenge to the Coal Industry Retiree Health Benefit Act, which imposed retroactive liability on former coal mine operators to fund the increased heath care costs of retired mine workers. The Court struck down the statute as unconstitutional, but could not agree on a rationale, with four Justices concluding that the statute effected a taking and a fifth, Justice Kennedy, concluding that the statute violated only the Due Process Clause.

Five Justices – Justice Kennedy and the four dissenters – viewed the case as turning on the legitimacy *vel non* of the law, and concluded that that issue necessarily arose only under the Due Process Clause, and not the Just Compensation Clause. Justice Kennedy concluded that the legislation was "arbitrary" and "must be invalidated as contrary to essential due process principles." *Id.* at 539 (Kennedy, J., concurring in judgment). But precisely because the case involved an allegation of arbitrary action, he also concluded that the Just Compensation Clause did not apply. Justice Kennedy acknowledged that the Court had stated that a taking can occur if the government action does not "substantially advance legitimate state interests," but observed that "[t]his sort of analysis is in uneasy tension with our basic understanding of the Takings Clause, which has not been understood to be a

substantive or absolute limit on the government's power to act." *Id.* at 545. He therefore concluded that the Court should "reserv[e] takings analysis for cases where the governmental action is otherwise permissible." *Id.* at 546. Because the constitutionality of the Coal Act turned on "the legitimacy of Congress' judgment rather than on the availability of compensation, the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause." *Id.* at 545.

Justice Breyer, joined by three other Justices, agreed that review of the arbitrariness of government action is governed by the Due Process Clause and not the Just Compensation Clause. Like Justice Kennedy, Justice Breyer concluded that the "Takings Clause does not apply." *Id.* at 554. He observed that "at the heart of the Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes 'private property' to serve the 'public' good." *Id.* There is "no need to torture the Takings Clause," he wrote, to accommodate claims of arbitrariness that have a "natural home in the Due Process Clause, a Fifth Amendment neighbor." *Id.* at 556.

It is fairly debatable whether the agreement of the concurring and dissenting Justices in *Eastern Enterprises*, together making up a majority of the Court, should be treated as a binding precedent on whether an allegation of arbitrary government action can support a claim of a taking under the Just Compensation Clause. *Cf. Marks v. United States*, 430 U.S. 188 (1977). What is not debatable is that the various opinions in *Eastern Enterprises* refute the argument that the "substantially advance" test is deeply embedded in the Court's takings jurisprudence, given that five Justices expressly rejected the validity of that test.

Shortly after *Eastern Enterprises* was decided, the Court again confronted the issue and demonstrated that it

viewed the validity of the "substantially advance" test as unsettled. In *City of Monterey v. Del Monte Dunes at Monterey, supra,* the Court could not reach the issue because the defendant city had waived any objection to the application of the "substantially advance" test. The Court declined the urging of the United States, as amicus, that it declare definitively that the "substantially advance" test is not a takings test, observing that this test was "consistent with our previous general discussions of regulatory takings liability," *id.* at 704 – a point that was indisputably true, given the Court's dictum in *Agins*. Even so, the Court acknowledged in *Del Monte Dunes* that it has never provided "a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions." *Id.* To like effect, Justice Souter in dissent, joined by three other Justices, expressly "offer[ed] no opinion here on whether *Agins* was correct in assuming that this prong of liability was properly cognizable as flowing from the Just Compensation Clause of the Fifth Amendment, as distinct from the Due Process Clauses of the Fifth and Fourteenth Amendments." *Id.* at 753 n.12 (Souter, J., dissenting). And Justice Scalia, in his separate opinion, similarly "express[ed] no view as to [the] propriety" of the *Agins* language as a takings test. *Id.* at 732 n.2 (Scalia, J., concurring). Thus, every Justice wrote or joined in an opinion casting doubt on the applicability of the "substantially advance" takings test.

Aside from these cases, the Court has confronted a claim that a regulation failed to advance a legitimate governmental interest in only two cases, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), and *Yee v. City of Escondido*, 503 U.S. 519 (1992). Neither decision supports the validity of this takings theory. In *Keystone*, the state government did not challenge the "substantially advance" theory, and the Court's rejection of the claim on the merits does not stand as a holding that

the "substantially advance" test is in fact valid. In *Yee*, the Court declined to resolve whether a challenged rent control ordinance constituted a taking under the "substantially advance" theory, since that issue was not within the scope of the question on which the Court had granted certiorari. *See* 503 U.S. at 533-38. In sum, a clear statement by the Court that the "substantially advance" test is not a test for a taking would not affect the result in any prior decision of this Court. To the contrary, it would simply confirm the already widely held view that this is not a taking test but rather represents a due process inquiry.[13]

2. The conclusion that the "substantially advance" language is not a valid takings test does not affect this Court's decisions in *Nollan* and *Dolan*. These decisions establish special legal standards to address the situation where government officials, in the context of individual land use permitting decisions, seek to attach permit conditions requiring owners to grant the public continuous access to their property. These decisions are explained by, and are logically confined to, the context of exactions.

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[13] Not surprisingly, given the Court's own express ambivalence about this ostensible takings test, the lower federal and state courts have been reluctant to rely on this takings theory and have rarely done so. *See, e.g., State v. City of Mayfield Heights*, 765 N.E.2d 345, 351 (Ohio 2002); *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401, 408-12 (Neb. 1994). Many lower courts have simply referred to the test in passing or ignored it altogether. In the Court of Federal Claims, which hears virtually all takings claims against the United States, there is apparently not a single decision upholding a taking claim under this theory. *See Seiber v. United States*, 364 F.3d 1356, 1367-68 (Fed. Cir. 2004) (noting that the Supreme Court has "declined to decide the continued viability of *Agins*," but finding it unnecessary to resolve the validity of the theory because the challenged federal program served a legitimate public purpose); *Bamber v. United States*, 45 Fed. Cl. 162, 165 (1999) ("This alternative takings analysis, first alluded to in *Agins*, has not had a fruitful life.").

Nollan and *Dolan* are best understood as a species of physical appropriation cases. If the conditions at issue in those cases had been imposed independently of a development permit, they would unquestionably have constituted *per se* takings under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). The question the Court faced in these cases was whether and under what circumstances the government could avoid takings liability if such requirements were attached to permits that the government could have denied, without incurring takings liability, in the proper exercise of its regulatory authority. The Court resolved this problem by ruling that such conditions will not effect a taking when (1) there is a "nexus" between the conditions and the government's regulatory purposes, *Nollan*, 483 U.S. at 837, and (2) there is a "rough proportionality" between what the owner surrendered and the impact of the proposed development, *Dolan*, 512 U.S. at 391.

As the Court explained in *Dolan*, these requirements of a nexus and rough proportionality essentially serve as a version of the unconstitutional-conditions doctrine in this unusual context. 512 U.S. at 385. If the exaction is closely related to the government's programmatic interest, that tends to show that government officials are not using a regulatory review process as a pretext for appropriating property. *Cf. FCC v. League of Women Voters*, 468 U.S. 364, 388 (1984) (finding violation of First Amendment under unconstitutional conditions doctrine where challenged restriction did not "substantially advance" asserted governmental interest). By contrast, if there is little relation because the government's objective and the exaction, that suggests that the government might be engaging in a kind of regulatory "extortion" by imposing unconstitutional conditions in ad hoc permitting decisions. *See Nollan*, 483 U.S. at 837.

Nollan and *Dolan* can and should easily survive repudiation of the "substantially advance" language as a

general test for a regulatory taking. Those cases are not traditional regulatory takings cases at all; rather, they stand at a unique intersection of physical-occupations law and the unconstitutional conditions doctrine. They rest on their own foundations as a means to address the potential for abuse in government exactions in the permitting context and have little significance outside that unusual domain. Indeed, in *Dolan* the Court indicated that the type of exacting scrutiny applied to ad hoc exactions could not properly be applied to general legislation. 512 U.S. at 385. The Court subsequently ruled that the "rough proportionality" test of *Dolan* (and, by clear implication, the *Nollan* "essential nexus" test as well) does not extend "beyond the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use." *Del Monte Dunes*, 526 U.S. at 702. These limitations further indicate that the Court understood its use of the "substantially advance" language in *Nollan* and *Dolan* as a response to the special concerns raised by those cases, and not as one instance of a more general substantive limitation on regulatory authority affecting private property.

3. Finally, there is no merit to the potential argument that endorsing the problematic "substantially advance" theory is somehow necessary to preserve important protections for private property. The State's position is not that constitutional means-ends analysis should be eliminated or discarded, but rather that it should be recognized for what it is: an inquiry that belongs under the Due Process Clause. Whatever protection property owners have under the "substantially advance" test can properly be provided directly under the Due Process Clause, without the confusing intermediation of the Just

Compensation Clause, and with the proper level of deferential review appropriate to state economic regulation.[14]

The State recognizes that substantive due process is a somewhat disfavored category of constitutional analysis. But due process review, though deferential, is not toothless. *See State Farm*, 538 U.S. at 417 (invalidating punitive damages award under substantive due process); *BMW of North Am. v. Gore*, 517 U.S. 559, 569 (1996) (same). *Cf. Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, 488 U.S. 336, 343 (1989) (invalidating county's tax assessments under Equal Protection Clause). To be sure, substantive due process analysis raises profound questions about the authority of courts to engage in the kind of normative analysis ordinarily left to the political branches. But relabeling what in reality is a due process inquiry as a takings test does not "avoid making a normative judgment," for the Courts "must make the normative judgment in all events." *Eastern Enters.*, 524 U.S. at 544 (Kennedy, J., concurring in judgment). Accordingly, the Court should now make clear that, outside the exactions context, the question whether a regulation substantially advances a legitimate state interest has no place in takings law.

[14] The Ninth Circuit has gone beyond embracing the ostensible "substantially advance" takings test to rule that property owners challenging regulations as arbitrary or illegitimate in a constitutional sense *must* bring their claims under the Just Compensation Clause rather than the Due Process Clause. *See, e.g., Macri v. King County*, 126 F.23d 1125, 1129 (9th Cir. 1997). In other words, the Ninth Circuit has arrived at the bizarre conclusion that what in reality is a due process claim *can* be brought under the Just Compensation Clause and *cannot* be brought under the Due Process Clause itself. The majority of other circuits have rejected this implausible position. *See* Robert Ashbrook, *Land Development, the Graham Doctrine, and the Extinction of Economic Substantive Due Process*, 150 U. PA. L. REV. 1255 (2002). The Ninth Circuit's problematic position will presumably evaporate if the Court affirms that substantive due process claims cannot be dressed up as takings claims.

II. IF MEANS-ENDS REVIEW WERE APPROPRIATE UNDER THE JUST COMPENSATION CLAUSE, THE NINTH CIRCUIT ERRED IN FAILING TO APPLY A DEFERENTIAL STANDARD OF REVIEW

Even if means-ends analysis were appropriate under the Just Compensation Clause, the judgment of the Ninth Circuit should be reversed because the courts below used an inappropriately exacting standard in applying this analysis. There is no question that Act 257 meets the rational-basis test traditionally applied to economic legislation, and neither Chevron nor the courts below have suggested otherwise.

A. The Standard of Review Applied By The Ninth Circuit Violates Settled Understandings About The Proper Role Of the Courts In Assessing The Constitutionality Of Economic Legislation

The heightened standard of review applied by the Ninth Circuit in this case represents an extraordinary departure from the deferential standard of review that is appropriate in constitutional challenges to economic legislation. "The day is gone when this Court uses the Due Process Clause . . . to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955). Under the Court's modern jurisprudence, "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality." *Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 637 (1993). Rent control laws have long been considered the kind of economic regulation subject to invalidation only when "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt."

Pennell v. City of San Jose, 485 U.S. 1, 11 (1988); *see also Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974).

In striking contrast to this established approach, the lower courts in this case openly engaged in *de novo* review of the soundness of the Hawaii legislature's economic policy judgment. The Ninth Circuit directed the District Court to determine, as a matter of "predictive fact," whether Act 257 would achieve the State's goals. Pet. App. 69-72. On remand, the District Court resolved what was in essence a public policy debate by hearing expert testimony from each side about the likely effectiveness of the law, applying a preponderance of the evidence standard and even taking into account the demeanor of each expert witness. According no deference whatsoever to the legislature's judgment, the District Court pronounced the economic analysis offered by Chevron's expert "more persuasive," and accordingly declared Act 257 unconstitutional. *Id.* at 43. On appeal, the Ninth Circuit freely acknowledged that it had imposed "heightened" scrutiny as to the "means/ends fit" in Act 257, and rejected the State's contention that the legislature's judgment on matters of economic policy deserved deference. *Id.* at 13-16.[15]

[15] The Ninth Circuit also refused to accept the State's submission as to what the purpose of Act 257 *was* – the protection of consumers through the preservation of the current, relatively unconcentrated structure of the retail market for gasoline. Rather, the Ninth Circuit asserted that the purpose of Act 257 was to reduce the retail price of gasoline from the levels at the time of enactment of the Act (an argument the State had never made). Pet. App. 18; *see* p. 9 n.4, *supra*. Similarly, the District Court discounted a central premise underlying the Act's purposes, that oil companies might attempt to apply pressure on independent dealers to effect a conversion of the stations to company control. Pet. App. 48, 52. Both courts thus departed from the settled principle that, even if the legislature has not articulated a rationale for a law, it should be upheld under rational-basis review if "any state of facts either known or which could reasonably be assumed affords support for it." *United States v. Carolene Products Co.*, 304 U.S. 144,

(Continued on following page)

The Court of Appeals' departure from fundamental principles of judicial restraint is dramatic. In the realm of economic legislation, "debatable questions as to reasonableness are not for the courts but for the Legislature," *Goldblatt*, 369 U.S. at 595, and there is "no need for mathematical precision in the fit between justification and means," *Concrete Pipe*, 508 U.S. at 639. The heightened standard of review applied by the Ninth Circuit thus contradicts the Court's modern understanding, painfully acquired over the course of the 20th Century, about the proper limits on the role of the judiciary in assessing the substantive wisdom of economic policies adopted by democratic institutions of government. In exposing the federal government, the States, and municipalities to second-guessing of their economic policy choices, the Ninth Circuit's decision threatens to revive, in the novel setting of takings law, a type of intrusive judicial review not seen in this country since the era of *Lochner v. New York*, 198 U.S. 45 (1905).

This Court's modern commitment to judicial restraint in review of economic legislation – regardless of the specific constitutional provision invoked – rests on several bedrock principles. First, tenets of democratic self-governance dictate that economic policy should be determined by elected representatives (or administrators accountable to them) rather than unelected judges. *See, e.g., Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). Second, the courts lack the institutional competence to make predictive judgments concerning the efficacy of economic regulation. *See, e.g., General Motors Corp. v. Tracy*, 519 U.S. 278, 308-09 (1997). Finally, within our federal system,

154 (1938); *cf. FCC v. Beach Communications*, 508 U.S. 307, 315 (1993) ("[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.").

deferential review by federal courts of the actions of state legislatures prevents concentration of power in federal hands and helps preserve the states as "laborator[ies]" with freedom to conduct "novel social and economic experiments." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Nothing in the Just Compensation Clause justifies a departure from these settled principles of deferential review for economic legislation. Although the Clause evinces solicitude for property interests by requiring compensation when the government takes private property for public use, the mere fact that government regulation may adversely affect private property has never been understood to warrant elevated judicial scrutiny. To the contrary, the Clause "allows government *confiscation* of private property so long as it is taken for public use and just compensation is paid; mere *regulation* of land use need not be 'narrowly tailored' to effectuate a 'compelling state interest.'" *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Found.*, 538 U.S. 188, 200 (2003) (Scalia, J., concurring). *See also Keystone*, 480 U.S. at 491 ("Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property."); *Lucas*, 505 U.S. at 1027 ("the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers"). And as the Court has often observed, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Mahon*, 260 U.S. at 413. It would be especially anomalous to conclude that means-ends analysis under the Just Compensation Clause calls for exacting scrutiny given that this test (if it is indeed a valid taking test) was derived from due process jurisprudence, which itself plainly mandates deferential review in this type of case. *See* pp. 24-25, *supra*.

The threat to the proper balance between the federal judiciary and elected state legislatures posed by the Ninth Circuit's decision is dramatically illustrated by the contrast between this decision and the Court's decision in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), in which the Court upheld, unanimously, a statute remarkably similar to Act 257 against challenges to its economic wisdom. In that case, the Court considered due process and other challenges to a Maryland law that, like the Hawaii act that preceded Act 257, prohibited oil companies from operating their own stations within the state. The oil companies contended that the law would be counterproductive because it would reduce the number of retail outlets for gasoline in the state and thus harm consumers. The Court responded in terms that flatly contradict the approach employed by the Ninth Circuit:

> The evidence presented by the refiners may cast some doubt on the wisdom of the statute, but it is, by now, absolutely clear that the Due Process Clause does not empower the judiciary to sit as a superlegislature to weigh the wisdom of legislation. . . . Appellants argue that [prohibiting company-operated gas stations] is irrational and that it will frustrate rather than further the State's desired goal of enhancing competition. But . . . this argument rests simply on an evaluation of the economic wisdom of the statute, and cannot override the State's authority to legislate against what are found to be injurious practices in their internal commercial and business affairs. *Regardless of the ultimate economic efficacy of the statute, we have no hesitancy in concluding that it bears a reasonable relation to the State's legitimate purpose in controlling the gasoline retail market* . . . .

Id. at 124-25 (emphasis added; citations and some punctuation omitted).

Under the Ninth Circuit's decision, however, if an oil company were to bring exactly the same claim, relabeled as a "substantially advance" takings claim, a federal court would be compelled to accord the State's "authority to legislate against . . . injurious practices" no weight whatsoever. Under the "substantially advance" test, the Maryland statute, like Act 257 in this case, could well be invalidated as an unconstitutional taking if the judge disagreed with the economic reasoning on which it was based. This strange result strongly indicates that the Ninth Circuit's decision is far astray from core principles of judicial review.

B. This Court's Decisions Under The Just Compensation Clause Also Support Deferential Review

1. The Court has spoken only briefly to the standard of review that might apply under the "substantially advance" test – which is hardly surprising given that the Court's takings precedents strongly suggest, if they do not establish, that means-ends analysis is not appropriate under the Just Compensation Clause at all. To the extent the Court has spoken to the issue, however, it has indicated that a deferential standard of review should apply. *Agins*, the origin of this supposed takings test, itself supports a deferential standard. In *Agins*, the Court summarily rejected plaintiffs' challenge to a municipal land use ordinance under the "substantially advance" theory. The Court observed that the California legislature had developed the goal of preserving open space and that such a purpose had "long . . . been recognized as legitimate." 447 U.S. at 261. The Court also concluded that the city's ordinance would advance that goal by controlling "the ill effects of urbanization," without closely examining either the circumstances surrounding

the law's implementation or whether the ordinance would actually achieve its goals. *Id.*[16]

The *Agins* Court's understanding of the "substantially advance" standard as a continuation of normal principles of deferential review of government regulation is confirmed by *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), decided one year after *Agins*. In discussing the standard applicable to constitutional review of zoning ordinances, the court in *Schad* described *Agins*, like the earlier due process decisions, as simply requiring "rational basis" review: "Where property interests are adversely affected by zoning, the Courts generally have emphasized the breadth of municipal power to control land use and have sustained the regulation if it is *rationally related* to legitimate state concerns . . . ." *Id.* at 68 (emphasis added) (citing, *inter alia*, *Agins* and *Euclid*).

The Court's subsequent decision in *Keystone* – indeed both the opinion for the Court and the dissent – confirm the applicability of a deferential standard in this context. The Court rejected (on the merits, and without examining the validity of the theory of liability) a claim that a Pennsylvania statute effected a taking because it failed to advance substantially a legitimate state purpose. In

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[16] The due process precedents cited in *Agins* also support a deferential standard. In *Nectow*, the Court stated that, "a court should not set aside the determination of public officers . . . unless it is clear that their action has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." 277 U.S. at 187-88. Likewise, in *Euclid*, the Court held that, to declare an ordinance unconstitutional, the Court must find that provisions "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." 272 U.S. at 395. In operation, these legal formulations support the same deferential standard that the Court applies in due process cases today. *See Dolan*, 512 U.S. at 391 n.8 (citing *Euclid* as a case in which the Court applied its "usual deference to the legislature").

dissent, Chief Justice Rehnquist, commenting on the majority's application of this test, stressed that courts should not review the efficacy of state legislation in determining whether it effects a "taking" under the Just Compensation Clause:

> [O]ur inquiry into legislative purpose is not intended as a license to judge the effectiveness of legislation. When considering the Fifth Amendment issues presented by Hawaii's Land Reform Act [in *Midkiff*], we noted that the Act, "like any other, may not be successful in achieving its intended goals. But 'whether *in fact* the provisions will accomplish the objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [State] Legislature *rationally could have believed* that the [Act] would promote its objective.'"

480 U.S. at 511 n.3 (quoting *Midkiff*, 467 U.S. at 242) (emphases and ellipses in *Keystone*). In response, the majority was in complete agreement that a deferential standard of review should apply and was in fact being applied in that case:

> We do not suggest that courts have "a license to judge the effectiveness of legislation," . . . or that courts are to undertake "least restrictive alternative" analysis in deciding whether a state regulatory scheme is designed to remedy a public harm or is instead intended to provide private benefits. That a land use regulation may be somewhat overinclusive or underinclusive is, of course, no justification for rejecting it. *See Euclid* . . . .

480 U.S. at 487 n.16 (citation edited).

2. The Ninth Circuit made several attempts to dismiss the significance of these takings precedents, none of which withstands scrutiny. First, the Ninth Circuit discounted the opinions in *Keystone*; it reasoned that, because Chief Justice Rehnquist referred to *Midkiff*, which

dealt with the requirement of a "public use," the discussion in *Keystone* was irrelevant to the standard of review that applies in deciding whether there has been a "taking." *See* Pet. App. 15, 59-60. That reading of the opinions in *Keystone* is simply wrong; *Keystone* itself involved a claim under the "substantially advance" theory.[17] Whether or not Chief Justice Rehnquist or the Court as a whole believed the appropriate standard of review should be borrowed from the public use cases (or was simply the very same standard), the crucial point is that the Court in *Keystone* was debating, and resolving, the appropriate standard to be applied under the "substantially advance" test. If this is a valid takings test, *Keystone* is binding, indeed unanimous, precedent mandating application of a deferential standard of review.

The Ninth Circuit also believed that use of heightened scrutiny in this case was supported by the Court's decisions in *Nollan* and *Del Monte Dunes*, but neither decision supports use of a heightened standard in a case (such as this) challenging general regulatory legislation. As discussed in Part I (pp. 33-35, *supra*), *Nollan* (and *Dolan*) rest on the particularly burdensome nature of conditions mandating that owners grant the public continuous physical access to their property and the special risk posed by imposition of such conditions in ad hoc permit proceedings. That is precisely why *Dolan* framed the issue as an application of the unconstitutional conditions doctrine, *see Dolan*, 512 U.S. at 385, and made clear that the same exacting scrutiny did not apply to legislative measures. *Id.* at 391 n.8.

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[17] The Ninth Circuit's reading of *Keystone* may have reflected its mistaken understanding that the case actually involved a direct exercise of eminent domain. *See* Pet. App. 15 ("[T]he Supreme Court reviews the challenged action in those cases [*Midkiff* and *Keystone*] more deferentially because they involve physical takings.").

The Court's subsequent decision in *Del Monte Dunes* further confirms that the heightened standard applied in exactions cases is confined to that context. The Court limited the scope of *Dolan* (and implicitly *Nollan*), stating that the "rough proportionality" test for exactions did not extend beyond the special context of "land-use decisions conditioning approval of development on the dedication of property to public use." 526 U.S. at 702. Just as *Del Monte Dunes* confined the scope of the exactions tests, it also necessarily confined the scope of the heightened standard used in applying those tests. Thus, the Ninth Circuit was plainly mistaken in thinking that *Nollan*'s use of heightened scrutiny to examine an ad hoc regulatory exaction could support application of the same standard in a case challenging general legislation. And it is most implausible to suggest that *Nollan* overruled, *sub silentio* and less than four months after the decision in *Keystone*, the Court's clearly expressed understandings in *Agins*, *Schad*, and *Keystone* that traditional, deferential judicial review applies to general economic legislation.

The Ninth Circuit nonetheless believed that *Del Monte Dunes* supports heightened scrutiny, but that reading is clearly mistaken. The Ninth Circuit viewed the Court's decision in *Del Monte Dunes* as having approved jury instructions that defined a government action as substantially advancing a legitimate public purpose if it "bears a reasonable relationship" to that objective. Pet. App. 14. But the Court quite clearly made no holding about the validity of the jury instructions in *Del Monte Dunes*, because the city itself proposed the instructions and therefore waived any possible objection to their substance. 526 U.S. at 704. Moreover, by expressly limiting the *Dolan* standard to exactions, the Court in *Del Monte Dunes*, if anything, cast doubt on the propriety of applying a heightened standard of review outside the exactions context. *See id.* at 702-03. *See also* p. 35, *supra*.

Nor, in any event, is there any basis for the Court of Appeals' conclusion that the phrase "reasonable relationship" in the jury instructions reviewed in *Del Monte Dunes* referred to a heightened standard of review. A "reasonable relationship" inquiry is often regarded as equivalent to the rational basis test. *See, e.g., Turner v. Safley*, 482 U.S. 78, 93 n.* (1987) (defining the rational-basis test as "whether the regulation is reasonably related to a legitimate governmental interest"); *see also Dolan*, 512 U.S. at 391 (noting similarity of "reasonable relationship" and "rational basis" language); BLACK'S LAW DICTIONARY 1290 (8th ed. 2004) (defining the "rational basis test" as an inquiry about whether a law "bears a reasonable relationship to the attainment of a legitimate governmental objective"). While the Court was aware in *Dolan* that some state courts had used the same terminology to denote an elevated standard of review, *see* 512 U.S. at 390, nothing in *Del Monte Dunes* connects the jury instructions in that case to those state court decisions. Thus, from all that can be discerned, use of this phrase in the jury instructions in *Del Monte Dunes* denoted a deferential standard of review.

3. Finally, there remains the contention that, by using the term "substantial" in *Agins*, the Court *necessarily* intended to require heightened scrutiny of the means-ends fit of state economic regulation (even though the Court itself has not done so in later cases). The word "substantial," however, is ambiguous and does not inevitably carry that connotation. *See Pierce v. Underwood*, 487 U.S. 552, 564-65 (1988) (noting that the word "substantial" can have "almost contrary" connotations). "Substantial," when used in this context, often means "nontrivial" rather than "weighty." For example, in *Nebbia v. New York*, 291 U.S. 502 (1934), one of the Court's New Deal decisions that repudiated intrusive review of state economic regulation, the Court referred to the proper standard of review under the Due Process Clause as "real and substantial relation," *id.* at 525, and the Court itself clearly applied deferential

scrutiny. Later in that decision, the Court also phrased the due process test in terms of a "reasonable relation to a proper legislative purpose," *id.* at 537, suggesting that "substantial" is equivalent to "reasonable" – which is itself often used as a substitute for "rational" (*see* p. 47, *supra*). This is not to suggest that the phrase "substantially advance" *cannot* be used to describe a heightened standard of review. But nothing in *Agins* suggests that, by using the word "substantial" in passing, this Court intended (again assuming it established a takings test at all) to launch the lower courts on a far-reaching venture of scrutinizing state (and federal) legislation for conformity to economic theory.[18]

[18] In a footnote in *Nollan*, the Court remarked:

> We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), not that "the State *'could rationally have decided'* that the measure adopted might achieve the State's objective. . . . [T]here is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical. . . .

483 U.S. at 835 n.3 (citations edited). This tentative statement is far from an assertion that the word "substantially," by itself, mandates application of heightened scrutiny, and it certainly does not represent a holding that this word supports a heightened standard of review in takings cases outside the exactions context. To the contrary, the Court suggested that the word "substantially" has particular, if not exclusive, salience in exactions cases. *See id.* at 841 ("We are inclined to be particularly careful about the adjective ["substantial"] where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective."). Fairly read, the quoted passage simply indicates that the wording in the Court's prior takings cases was sufficiently capacious to permit use of heightened scrutiny where such a standard was independently justified, as with exactions. It does not mandate application of heightened scrutiny to general legislation not

(Continued on following page)

* * *

To resolve this case, the Court should simply reaffirm fundamental principles of judicial review of state economic legislation. Unless economic regulation is shown to be arbitrary and irrational, or directed at aims that are not the legitimate province of government, the courts have no warrant to reweigh the evidence about the wisdom or efficacy of a measure adopted by a state legislature. As this Court stated in *Ferguson v. Skrupa*, 372 U.S. 726 (1963):

> We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. . . . We are not concerned . . . with the wisdom, need, or appropriateness of the legislation. Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.

Id. at 730-31 (citations, punctuation, and footnotes omitted).

involving exactions, where the justifications for elevated scrutiny do not exist, as the Court's decisions issued both prior to and subsequent to *Nollan* confirm.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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ACT 257

HOUSE OF REPRESENTATIVES
NINETEENTH LEGISLATURE, 1997
STATE OF HAWAII

H.B. NO. 1451
H.D. 1
S.D. 1
C.D. 1

A BILL FOR AN ACT

RELATING TO THE PETROLEUM INDUSTRY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. **Legislative findings and declarations**. The legislature reiterates its findings and declarations of section 1 of Act 291, Session Laws of Hawaii 1991, that:

(1) The petroleum industry is an essential element of Hawaii's economy and is therefore of vital importance to the health and welfare of all people in the State of Hawaii;

(2) A complete and thorough understanding of the operations of the petroleum industry is required by the state government at all times to enable it to respond to possible shortages, oversupplies, and other market disruptions or impairment of competition;

(3) Information and data concerning all aspects of the petroleum industry, including, but not limited to, crude oil production, supplies, refining, product output, prices, distribution, and demand are essential for the State to develop and administer energy policies which are in the interest of the State's economy and the public's well-being;

(4) Because Hawaii is a physically small and geographically remote economy, certain of its

markets tend to be concentrated. Market concentration is a function of the number of firms in the market and their respective market shares. In a highly concentrated market, market prices tend to rise above competitive levels. Market prices persistently above competitive levels are harmful to consumers and the public. Barriers to competition tend to cause supracompetitive prices to persist; and

(5) The markets for oil and oil products in Hawaii are highly concentrated markets.

* * *

SECTION 3. Chapter 486H, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

§ 486H- Restrictions on manufacturers or jobbers in operating service stations; lease rent controls; definitions. (a) Beginning August 1, 1997, no manufacturer or jobber shall convert an existing dealer operated retail service station to a company operated retail service station; provided that nothing in this section shall limit a manufacturer or jobber from:

(1) Continuing to operate any company operated retail service stations legally in existence on July 31, 1997;

(2) Constructing and operating any new retail service stations as company operated retail service stations constructed after August 1, 1997, subject to subsection (b); or

(3) Operating a former dealer operated retail service station for up to twenty-four months until a replacement dealer can be found if the former dealer vacates the service station, cancels

the franchise, or is properly terminated or not renewed.

(b) No new company operated retail service station shall be located within one-eighth mile of a dealer operated retail service station in an urban area, and within one-quarter mile in other areas. For purposes of this subsection, "urban" means the first congressional district of the State, and "other areas" means the second congressional district of the State.

(c) All leases as part of a franchise as defined in section 486H-1, existing on August 1, 1997, or entered into thereafter, shall be construed in conformity with the following:

(1) Such renewal shall not be scheduled more frequently than once every three years; and

(2) Upon renewal, the lease rent payable shall not exceed fifteen percent of the gross sales, except for gasoline, which shall not exceed fifteen per cent of the gross profit of product, excluding all related taxes by the dealer operated retail service station as defined in section 486H-1 and 486H- plus, in the case of a retail service station at a location where the manufacturer or jobber is the lessee and not the owner of the ground lease, a percentage increase equal to any increase which the manufacturer or jobber is required to pay the lessor under the ground lease for the service station. For the purposes of this subsection, "gross amount" means all monetary earnings of the dealer from a dealer operated retail service station after all applicable taxes, excluding income taxes, are paid.

The provisions of this subsection shall not apply to any existing contracts that may be in conflict with its provisions.

(d) Nothing in this section shall prohibit a dealer from selling a retail service station in any manner.

(e) For the purposes of this section:

"Company operated retail service station" means a retail service station owned and operated by a manufacturer or jobber and where retail prices are set by that manufacturer or jobber.

"Dealer operated retail service station" means a retail service station owned by a manufacturer or jobber and operated by a qualified gasoline dealer under a franchise.

"Operate" means to engage in the business of selling motor vehicle fuel at a retail service station through any employee, commissioned agent, subsidiary company, or person managing a retail service station under a contract and on a fee arrangement with the manufacturer or jobber.

"Retail" means a sale of gasoline made to the general public at prices that are displayed on the dispensing equipment."

SECTION 4. Chapter 486E, Hawaii Revised Statutes, is repealed.

SECTION 5. Chapter 486I, Hawaii Revised Statutes, is repealed.

SECTION 6. Chapter 486H-10, Hawaii Revised Statutes, is repealed.

["**§ 486H-10 Prohibition of manufacturer or jobber from operating a service station.** (a) From July 31, 1993, to August 1, 1997, no manufacturer or jobber shall operate a major brand, secondary brand, or unbranded retail service station in Hawaii to sell its petroleum products; provided that for each dealer operated retail service station owned by a manufacturer or jobber opened on or after July 31, 1995, that manufacturer or jobber may open one company operated retail service station, up to a maximum of two company owned retail service stations.

For purposes of this subsection:

"Company operated retail service station" means a retail service station owned and operated by a manufacturer or jobber.

"Dealer operated retail service station" means a retail service station owned by a manufacturer or jobber and operated by a qualified gasoline dealer.

(b) For the purposes of this section, the term "to operate" means to engage in the business of selling motor vehicle fuel at a retail service station through any employee, commissioned agent, subsidiary company, or person managing a retail service station under a contract and on a fee arrangement with the manufacturer or jobber.

(c) This section shall not apply to any individual locations operated by any manufacturer or jobber on the effective date of this Act. Nor shall anything contained in this section prohibit a manufacturer or jobber from acquiring or constructing replacement retail service stations to replace any company-operated retail service stations in

existence on July 30, 1993, that have subsequently closed due to the expiration or termination of the retail service station's ground lease; provided that:

(1) The manufacturer or jobber shall negotiate in good faith to renew the ground lease of the retail service stations; and

(2) The replacement retail service stations shall be located within a one-mile radius of the retail service stations that they replace.

As used in this subsection, "good faith" means an honest and sincere intention to renew the ground lease of retail service stations."]

SECTION 7. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 8. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 9. This Act shall take effect on August 1, 1997.

APPROVED this 21st day of June, 1997

/s/ Benjamin J. Cayetano
GOVERNOR OF THE STATE OF HAWAII